



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 9, 1998

Ms. Katherine Martinez-Vitela
Gary, Thomasson, Hall & Marks
P.O. Box 2888
Austin, Texas 78403

OR98-2399

Dear Ms. Vitela:

On behalf of the Aransas County Independent School District (the "school district") you ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 118522.

The school district received a request for "any and all complaints against Nancy Lee as well as a copy of any statements or interview notes pertaining to those complaints." In response to the request, you submit to this office for review the information which you assert is responsive. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103 and 552.107 of the Government Code. We have considered your claimed exceptions and arguments and have reviewed the information submitted.

To show that section 552.103(a) is applicable, the school district must demonstrate that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the school district must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You explain that the requested information, submitted as Exhibits A and B, "was created in anticipation of litigation. Specifically, at the time this document was created, Ms. Lee had retained counsel to represent her." In this instance, however, there is no evidence that any party has taken concrete steps toward litigation. Given the information

provided, the prospect of litigation at this point is too speculative for section 552.103(a) to be applicable. Open Records Decision No. 518 at 5 (1989) (governmental body must show that litigation involving a specific matter is realistically contemplated). Therefore, at this time, the school district may not withhold the submitted documents pursuant to section 552.103(a).

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. Section 552.107(1) excepts information from disclosure if:

[I]t is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

When invoking this exception, the governmental body bears the burden of explaining how the particular information requested constitutes either a client confidence or a communication of legal advice or opinion. *See, e.g.*, Open Records Decision No. 589 (1991). In this instance, you have not shown how this exception applies to Exhibits A and B. Therefore, we conclude that Exhibits A and B may not be withheld pursuant to section 552.107(1).

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). An agency's policymaking processes do not encompass internal administrative and personnel matter. *See id.* As the information at issue concerns administrative and personnel matters, section 552.111 is inapplicable.

Finally, we consider your arguments under section 552.101 in conjunction with the informer's privilege. Section 552.101 of the Government Code excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing

particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285 (1981), 279 (1981); *see also* Open Records Decision No. 208 (1978). In this instance, after reviewing the submitted information, we do not believe that the informer's privilege is applicable.¹ Therefore, absent *special circumstances* that would warrant the withholding of the submitted information, you may not withhold the complaint letters in this instance. *See* Open Records Decision Nos. 169 (1977), 123 (1976).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Sam Haddad". The signature is written in dark ink and is positioned to the right of the typed name "Sam Haddad".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref: ID# 118522

Enclosures: Submitted documents

cc: Ms. Lisa Soto
Brim, Arnett & Robinett
2525 Wallingwood Drive
Austin, Texas 78746
(w/o enclosures)

¹We also note that most of the information at issue relates to the performance and behavior of a public employee. Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2(1984) (scope of public employee privacy is narrow).